APPEAL NO. 022256
FILED OCTOBER 28, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on July 25, 2002. The hearing officer determined that the compensable injury sustained by the respondent (claimant) on _____, includes neurogenic thoracic outlet syndrome. The appellant (carrier) complains on appeal that this determination is against the great weight and preponderance of the evidence and that the hearing officer abused his discretion by admitting the report of the Texas Workers' Compensation Commission (Commission)-appointed required medical examination (RME) doctor. The claimant urges affirmance of the hearing officer's decision.

DECISION

We affirm.

The carrier argues on appeal that the hearing officer abused his discretion and committed procedural error by admitting the report of the Commission-appointed RME doctor. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.6(a) (Rule 126.6(a)) provides, in part, that when a request is made by the Commission for a medical examination the Commission shall determine if an examination should be ordered, issue an order granting or denying the request within seven days of the date the request is received by the Commission, and send a copy of the order to the employee, the employee's representative (if any), and the carrier. Rule 126.6(b) provides, in part, that all examinations ordered must be scheduled to occur within 30 days after receipt of order, with at least 10 days notice to the employee and the employee's representative (if any). Rule 126.6(j) provides, in part, that the Commission shall order examinations requiring travel of up to 75 miles from the employee's residence, unless the treating doctor certifies that such travel may be harmful to the employee's recovery and that travel over 75 miles may be authorized if good cause exists to support such travel. Specifically, the carrier contends that the Commission failed to comply with the aforementioned requirements of Rule 126.6, and, consequently, pursuant to Rule 126.5, the RME report cannot be considered.

Rule 125.5 mandates that the Commission shall not consider a report of an RME doctor that was not approved or obtained "in accordance with this section." However, the rule that the carrier contends that the RME request did not comply with is Rule 126.6, not 126.5. Therefore, the "shall not consider" language in Rule 126.5 is not applicable. The preamble to Rule 126.5 explains that "if a carrier does not comply with the requirements for requesting and scheduling examinations (including those that the employee agrees to), the carrier and the commission are not allowed to act with respect to benefits, based on the RME doctor's opinion." As the appointment in this case was made pursuant to Rule 126.6, the provisions of Rule 125.5, including the consequences for not complying with the section, are not applicable in this case.

We note that the record contains no evidence supporting the allegations of the carrier that the requirements of Rule 126.6 were not complied with by the Commission. However, even assuming that there was no compliance, Rule 126.6 does not contain a provision similar to the one found in Rule 126.5, which mandates that a report not obtained in accordance with the rule shall not be considered by the Commission. Further, the evidence reflects that the carrier was aware of the appointment of the RME doctor well in advance of the benefit review conference held in this case. However, the carrier made no effort to seek the addition of an issue concerning the propriety of the Commission's appointment of the RME doctor. Consequently, the carrier waived its right to contest the propriety of the appointment of the RME doctor. *See* Texas Workers' Compensation Commission Appeal No. 021345, decided July 15, 2002. Accordingly, the carrier has waived any error in this regard.

The hearing officer did not err in determining that the claimant's compensable injury includes neurogenic thoracic outlet syndrome. Extent of injury is a fact question for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

GEORGE MICHAEL JONES
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.

_____
Judy L. S. Barnes
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

CONCUR IN THE RESULT:

_____
Philip F. O'Neill
Appeals Judge